No. _____

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In The

Supreme Court of the United States

GEORGE MIYASHIRO,

Petitioner,

vs.

Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

GEORGE MIYASHIRO
In Propria Persona
75-5766 Kuakini Hwy. #702
Kailua Kona, Hawaii 96740
(808) 345-8913 Fax: (808) 329-2631

QUESTION PRESENTED FOR REVIEW

Do the U.S. Constitutional due process protections contained in the Fifth and Fourteenth Amendments, as interpreted through applicable case law, require that Petitioner herein, George Miyashiro, be allowed to have counsel of his choice, Eugene J. Albertini represent him pro hac vice at trial here, when no required reasons for denial have been given?

LIST OF PARTIES TO THE PROCEEDING

The petitioner in this case is GEORGE MIYASHIRO; the Respondents are the Honorable GEORGE M. MASUOKA, Judge in the trial court, and the SUPREME COURT OF THE STATE OF HAWAII, which denied the Petition for Writ of Mandamus.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner GEORGE MIYASHIRO (hereinafter "MIYASHIRO"), the Plaintiff in MIYASHIRO v. ROEHRIG, ROEHRIG, WILSON & HARA, etc., et al., Circuit Court of the Third Circuit State of Hawaii, Case No.: 04-1-0211, respectfully petitions for a Writ of *Certiorari* to review the Order Denying Petition for Writ of Mandamus filed on November 1, 2006 in the Supreme Court of the State of Hawaii.

OPINIONS BELOW

The Order Denying Petition for Writ of Mandamus filed on November 1, 2006 in the Supreme Court of the State of Hawaii is unreported and is therefore included herein as Appendix "A." MIYASHIRO's Petition for Writ of Mandamus to the Hawaii Supreme Court is attached hereto as Appendix "B."

JURISDICTION

The Order Denying Petition for Writ of Mandamus was filed on November 1, 2006 in the Supreme Court of the State of Hawaii. This Petition to the Supreme Court is timely if filed on or before January 30, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states, in pertinent part, that no person shall " . . . be deprived of life, liberty, or property, without due process of law . . . . " The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, " . . . nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment (a).

STATEMENT OF THE CASE

A. INTRODUCTION

This Petition arises out of a legal malpractice action in the State of Hawaii. As explained in his pleadings, MIYASHIRO was seriously abused by his counsel in a previous action, STANLEY H. ROEHRIG, ESQ. (hereinafter "ROEHRIG"). The Hawaii bar of attorneys is a relatively small and fairly cohesive group. ROEHRIG has, prior to representing MIYASHIRO, attained a position of some eminence, power and respect. As testament to his power and connections, after the case was filed, each of the judges in the Hawaii Third Circuit recused themselves; eventually a special judge had to be appointed by the Presiding Judge. Another result of ROEHRIG's position and stature caused difficulty for MIYASHIRO in locating counsel to represent him in his malpractice action. MIYASHIRO unsuccessfully interviewed literally scores of Honolulu, Big Island and other Hawaii attorneys in an effort to find counsel in the State of Hawaii to prosecute his malpractice action against ROEHRIG. MIYASHIRO did retain local counsel, DAVID J. GIERLACH, ESQ., but

with the understanding and expectation that EUGENE J. ALBERTINI, ESQ. ("ALBERTINI"), an experienced trial attorney in good standing in the State of California, would be granted *pro hac vice* status in Hawaii to conduct discovery in the matter, trial preparation and actually act as first chair trial counsel for the matter.

ALBERTINI was actually allowed to conduct discovery in the case (including depositions), but was denied the right to act as counsel for MIYASHIRO at trial. This first denial was initially made by one of the judges who later recused himself, Judge Ronald Ibarra, prior to his recusal; he obviously made a material and substantive decision he should arguably not have made in light of his later recusal. This denial of *pro hac vice* status for conduct of the trial was later upheld by the present judge, George M. Masuoka. A Petition for Writ of Mandamus to the Hawaii Supreme Court was made for the denial of *pro hac vice* status at trial, but it was denied. *See*, Appendix A. The Hawaii Supreme Court basically side-stepped the issue, focusing on the discretion of Judges Ibarra and Matsuoka to deny *pro hac vice* status to ALBERTINI to conduct the trial against ROEHRIG, rather than the transparently specious reasons given by Judge Ibarra for denying to MIYASHIRO his constitutional right to counsel of his choice, let alone the impropriety of Judge Ibarra making the ruling in light of the fact that he later recused himself in the matter.

B. BACKGROUND

MIYASHIRO's allegations of malpractice against ROEHRIG are serious and ROEHRIG's alleged acts of malpractice are many. It is manifest that seldom has a

client been as abused by his attorney as MIYASHIRO has been by ROEHRIG. The allegations include multiple violations of the Rules of Professional Conduct in Hawaii including, without limitation: simultaneous representation of multiple clients despite manifest conflicts of interest; conspiring with others against his client; divulging confidential client information to adversarial parties in violation of the attorney-client privilege; giving advice and counsel to unrepresented and adversarial parties; acting against the interests and instructions of his client; acting without the consultation and input of his client; improperly retaining client property against the client's wishes; taking a position adverse to his client and his client's interests; testifying against his client and his client's interests; using client assets to fund litigation against that same client; and other breaches of duties, including the duty of loyalty ROEHRIG owed to MIYASHIRO. Unfortunately, ROEHRIG has been also practicing for many years in the State of Hawaii and has held political offices of power and influence. The Hawaii Bar is relatively small and close-knit. MIYASHIRO had great difficulty in finding an attorney to help him seek redress against the rather influential ROEHRIG. It should be noted that, after the case was filed, each of the judges in the Third Circuit Courts for the State of Hawaii recused themselves from hearing the case, another testament to the pervasive contacts of ROEHRIG. The Presiding Judge finally appointed a special judge, the present one, the Honorable George M. Masuoka.

Even prior to filing the complaint in this case, MIYASHIRO retained the services of ALBERTINI. ALBERTINI engaged in substantial investigation of the facts and documents related to the matter. ALBERTINI reviewed

over twenty boxes of documents, interviewed witnesses and conducted other "due diligence" investigation to satisfy himself that a good-faith case existed against ROEHRIG. After the case was filed, each of the judges for the Third Circuit Court of Hawaii recused themselves from hearing this case. The recusals included the Honorable Ronald Ibarra. However, Judge Ibarra did not recuse himself until after he had heard and denied the motion to allow ALBERTINI to appear as counsel *pro hac vice*. Judge Ibarra cited the following reasons to deny ALBERTINI *pro hac vice* status:

> He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

In light of Judge Ibarra's comment that MIYASHIRO had not exhausted his efforts to find local counsel to try the case, MIYASHIRO then again undertook an exhaustive effort to contact counsel throughout the State of Hawaii seeking representation in this case; in fact he contacted virtually every trial attorney on the big island of Hawaii and was turned down by them all. He then filed, on November 22, 2004, a second motion before Judge Ibarra to allow ALBERTINI to appear as *pro hac vice* for purposes of the trial. Therein, MIYASHIRO delineated his exhaustive efforts to find local counsel to try this case. Those efforts were unsuccessful. On December 8, 2004, Judge Ibarra recused himself from this case before ruling on the second motion.

On December 14, 2004, the Hawaii Supreme Court assigned the Honorable George M. Masuoka as the Presiding Judge in this case. The motion to permit ALBERTINI to appear *pro hac vice* came on for hearing before Judge Masuoka on April 6, 2005. Because of the importance to MIYASHIRO of ALBERTINI being able to play a significant role in the trial and preparation of this case, MIYASHIRO went to the remarkable extent of agreeing with the Defendants to dismiss Co-Defendants Judge Glenn Hara and the ROEHRIG Law Firm as Defendants in exchange for Defendants withdrawing their objection to ALBERTINI's *pro hac vice* status. During off the record discussions, Judge Masuoka said he would not agree to allow ALBERTINI full status at that time, i.e. participation at trial. The parties and the Judge then agreed that ALBERTINI would be permitted to participate in all non-court matters and the issue of his participation at the trial was to be reserved for further determination. In early May 2006, MIYASHIRO again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant ALBERTINI full status as *pro hac vice*. Judge Masuoka still declined.

Plaintiff renewed his request, for a third time, for admission of ALBERTINI full status *pro hac vice*. That motion came on for hearing on September 19, 2006. It was denied by Judge Masuoka. Judge Masuoka gave two reasons for the denial. First, he said he had the discretion to deny it and second, he tended to agree with judge Ibarra's reasoning in the original denial. MIYASHIRO thereupon, in October 2006, filed a Petition for Writ of Mandamus with the Supreme Court of Hawaii. A copy of this Petition, without exhibits, is attached hereto as Appendix "B." As indicated above, on November 1, 2006,

the Hawaii Supreme Court filed its denial of the Petition, based upon its conclusion that "there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawai'i [sic] state court" and therefore the trial court's denial of *pro hac vice* status was a matter of discretion for the trial court which the Supreme Court did not feel it could overturn and concluded that Judge Ibarra's initial ruling was correct.

REASONS FOR GRANTING THIS PETITION

A. THE HAWAIIAN COURTS ERRED BECAUSE THERE IS A CONSTITUTIONAL RIGHT TO CHOICE OF COUNSEL IN BOTH CIVIL AND CRIMINAL CASES.

In its order Denying Petition for Writ of Mandamus, Appendix A hereto, the Hawaii Supreme Court stated " . . . it appears that there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawaii state court." Counsel for ROEHRIG fostered this by incorrectly arguing that the right to counsel of choice only applied in criminal matters, but is not a correct statement of the law. Part of the problem is that the Hawaii Supreme Court was too focused on the right of ALBERTINI to be admitted *pro hac vice* in order to appear as lead counsel for MIYASHIRO in his forthcoming trial against ROEHRIG, arising out of ROEHRIG's alleged legal malpractice against MIYASHIRO. It is true that there are cases that suggest there may not be a constitutional "property" right to *pro hac vice* status for an attorney. There is, however, a well-established authority that there is a constitutional right to representation by counsel of one's choice in both criminal and civil cases under the

provisions of the Sixth (for criminal cases), Fifth and Eleventh Amendments to the U. S. Constitution. By denial of the application to allow ALBERTINI to appear for MIYASHIRO *pro hac vice* and denial of the petition for Writ of Mandamus, MIYASHIRO has effectively been deprived of his constitutional right.

It has been stated that the U.S. Constitution nowhere specifically says that a state cannot deprive persons of counsel in civil trials, but a number of cases have addressed the issue, and this Court has construed precedent to find a constitutional right to retain hired counsel. *See, Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1180-1181 (5th Cir. 1992). This principle is not new. In this Court's decision in *Powell v. Alabama*, 287 U.S. 45, 64 (1932), it stated,

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The court in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980), clarified the principle and its basis, "In each instance, the right to counsel is one of constitutional dimensions and ***should thus be freely exercised without impingement***." (Emphasis added.) The court in *Gray v. New England Telephone and Telegraph Co.*, 792 F.3d 251, 257 (1st Cir. 1986) explained further,

> While right to counsel in the criminal and civil context are not identical, a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case. See *Potashnick v. Port City Construction Co.*, 609

> F.2d 1101, 1117-19 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980). This right has been considered so important that it has been extended to certain administrative proceedings as well. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (in welfare benefits termination hearing, recipient must be allowed to retain an attorney if he so desires).

On this issue, the court in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983), added, "Litigants do have a right to be represented by counsel and this ordinarily implies a right to lawyers of their choice. The right to counsel does not, however, entail absolute freedom of choice." The court explained,

> The right to counsel of one's choice may be overridden when 'compelling reasons exist.' The right should be balanced in cases in which it is challenged against the right to 'untainted prosecution of the lawsuit' and society's need to maintain the highest ethical standards of professional responsibility. It cannot be exercised without thought also to the needs of effective administration of justice. *Id.* at 1263.

In the recent case of *U.S. v. Gonzalez-Lopez*, 126 S. Ct. 2557, 165 L.Ed. 2d 409, 414 (2006), this Court held, in the context of a criminal prosecution, that a criminal defendant has a constitutional right to counsel of his choice, and need not show that substitute counsel was or would be ineffective. The defendant need not show prejudice arising out of the denial of the counsel of his choice; the guarantee of fairness in allowing the defendant the counsel of his choice means that the accused be defended by the counsel of his choice. *Id.* As discussed above, the constitutional

right to counsel of choice is not limited to criminal proceedings, so this Court's holding in *Gonzalez-Lopez* reinforces MIYASHIRO's right here to have the counsel of his choice, ALBERTINI, to represent him at trial.

B. PLAINTIFF MIYASHIRO HAS A RIGHT TO HAVE ALBERTINI REPRESENT HIM AT TRIAL AND WAS WRONGFULLY DEPRIVED OF THAT RIGHT IN THIS CASE.

As noted above, and in other of the cases cited herein, the right to counsel of choice is not absolute or unfettered. That, however, is a far cry from the decision of the Supreme Court of the State of Hawaii that MIYASHIRO had ***no*** rights at all to his choice of ALBERTINI. Courts have discussed the kind of balancing test that should take place when a court is deciding, in its discretion, whether or not to allow a litigant's choice of counsel to represent him in a criminal or civil case. For example, the court in *In re Bell South Corp.* 334 F.2d 941, 956 (11th Cir. 2003) stated,

> Accordingly, a litigant's freedom to hire the lawyer of his choice can be overridden if a court finds that the choice would interfere with the orderly administration of justice. *Dinitz*, 538 F.2d at 1219; *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir. 1989).

The court also stated that the right to counsel of choice must yield a court's discretion to disqualify the counsel of choice because of misconduct impeding the orderly conduct of justice. *Id.* at 955. In addition, the choice of counsel may be overridden if the counsel was chosen solely or primarily for the purpose of disqualifying the judge. *Id.* at 956.

If the attorney is guilty of ethical violations, he may also be denied, but must be given a chance to answer the

charges. See, *Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553, 1559 (11th Cir. 1997). The *Schlumberger* court rejected a Fourth Circuit standard for deciding the issue because it gave the discretion to district courts "to deny admission *pro hac vice* to an attorney guilty of 'unlawyer-like conduct' because we found ***the discretion permitted by the Fourth Circuit too broad and, consequently, susceptible to abuse***." *Id.* (Emphasis added.)

In *U.S. v. Locascio*, 6 F.3d 924 (2d Cir. 1993), the court stated, "In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused's chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict." It also stated,

> There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation, [citations omitted], or because of the counsel's prior representation of a witness or co-defendant, [citation omitted]. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, [citations omitted], or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial, [citation omitted].

It is, therefore, within a court's discretion to refuse to allow a litigant in a civil trial the right to choose her own counsel, but that discretion is not without limits, including the ones discussed in the cases above regarding acceptable

bases for denying a litigant his right to counsel of choice. A guiding factor for courts in making such a decision was stated in *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975), discussing admission to a district court to appear *pro hac vice*, the court stated,

> Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court. An applicant for admission *pro hac vice* who is a member in good standing of a state bar may not be denied the privilege to appear except "on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." *Sanders v. Russell*, 401 F.2d at 247-48.

Even though this decision and others discussed herein concerned federal district court behavior, they still have at their roots the principle that a litigant has the right to counsel of his choice, which right exists in both federal and state courts, as seen from the cases cited above. The cases articulate a principle regarding the limits of a court's discretion to deny a litigant the right to counsel of choice, which should apply to federal and state courts as related to same constitutional rights and that is that a court's exercise of discretion in refusing to allow a litigant counsel of choice is not unfettered discretion and there must be clear and cogent reasons for the denial of this constitutional right.

Applying all this to the case at hand, first of all the Supreme Court of the State of Hawaii was simply in error when it held in its Order Denying Petition for Writ of

Mandamus that there is no right to counsel of choice in federal or state courts (as were ROEHRIG's counsel when they represented to the Hawaii Supreme Court that right to counsel of choice only applies in criminal cases). There is a clear constitutional right of Plaintiff MIYASHIRO to have ALBERTINI, his counsel of choice and in whom he has confidence, represent him in this action, including at trial. That is not to say that MIYASHIRO's right was absolute or automatically mandated granting ALBERTINI *pro hac vice* status. But as a direct result of the failure of the Hawaii Supreme Court to recognize the constitutional right, it failed to understand and appreciate that the trial court's discretion to deny MIYASHIRO the right to counsel of his choice is not absolute, and required consideration and articulation of the factors set forth in the cases cited herein for refusing to allow ALBERTINI the requested status. The Hawaii Supreme Court's review was thus doubly flawed and cannot be allowed to stand, when it upholds a meritless deprivation of MIYASHIRO's constitutional right.

The trial court's order denying *pro hac vice* status to ALBERTINI at issue here was made by the Honorable George A. Masuoka, who basically simply adopted the earlier ruling of the Honorable Ronald Ibarra, prior appointed Judge for this matter, when all other judges in the circuit recused themselves because of their relationships with Defendant ROEHRIG. That order stated as the reasons for denying that status to ALBERTINI:

> He [ALBERTINI] had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar

> population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

Local counsel Gierlach in reality did not have the time, because of a full schedule, to conduct discovery and trial in MIYASHIRO's case. His role was always intended as advisory and as local support for ALBERTINI. All of this was explained to the court and Judge Ibarra and Judge Masuoka.

Soon after making this ruling, when Judge Ibarra was presented with MIYASHIRO's second motion for *pro hac vice* status for ALBERTINI, Judge Ibarra recused himself as well, because of his relationship with Defendant ROEHRIG. Judge Ibarra only ruled on the first motion after the second was made and MIYASHIRO had unsuccessfully tried again to retain local counsel. In any event, his conflict did not prevent ***Judge Ibarra*** from depriving MIYASHIRO of his constitutional right to be represented at trial by the counsel of his choice.

The stated reasons are clearly essentially no reasons at all. Certainly there is stated no basis under the cases cited for denying the requested *pro hac vice* status to allow MIYASHIRO his right to counsel of his choice. Judge Ibarra states that ALBERTINI has been admitted four times before to appear *pro hac vice* in Hawaii, but there is no mention of any misconduct, conflicts of interest, unethical behavior or other problems that make it inadvisable to allow ALBERTINI to appear again here. There is certainly no apparent judicially fixed number of times an out-of-state attorney may appear *pro hac vice* in Hawaii. In fact there is no real basis stated in the ruling why ALBERTINI should not be acceptable as counsel for MIYASHIRO. Judge Ibarra merely speculates that there must be some

other attorney in Hawaii that MIYASHIRO could hire. Actually, when MIYASHIRO renewed the application for admission of ALBERTINI *pro hac vice*, he explained that he had in fact extensively tried to find another attorney he could hire, but was unable to do so. The ubiquitous influence of ROEHRIG made it impossible. In any event, MIYASHIRO's ability to hire another attorney is irrelevant. The issue here is whether the trial court and Supreme Court of Hawaii can deprive MIYASHIRO of his constitutional right to be represented at trial by the attorney of ***his*** choice. The constitutional right to counsel of your choice would be toothless and illusory if the standard for denying it can be that there may be some other attorney the litigant could hire; there would ***always*** be another attorney out there who ***could*** be retained.

There is no indication or findings in the rulings of Judges Ibarra and/or Masuoka that ALBERTINI was found unfit because of prior improper conduct, conflicts of interest, that he was not a member in good standing of the California Bar, was guilty of unethical behavior, that allowing ALBERTINI to appear and serve as trial counsel would cause delays of trial, or that ALBERTINI was advocated solely or primarily to disqualify the judge, or a finding of any of the other factors cited in the cases that discuss when a litigant may be deprived of the right to counsel of his choice. In fact, ALBERTINI was allowed to conduct discovery and complete much of the trial preparation for the case, before being told finally that he would not be allowed to represent MIYASHIRO at trial. Allowing ALBERTINI to act *pro hac vice* could thus only expedite the trial and guarantee that MIYASHIRO would receive the most knowledgeable and competent representation at trial. In addition, the court's allowance of ALBERTINI to

act in trial preparation and discovery created a justifiable expectancy that he would be allowed to conduct the trial. It is unfair of the court to simply deny the right without reason, when his participation had already been allowed.

Quoting the decision in *U.S. v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982), the court in *U.S. v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 126 (E.D.N.Y. 1988) stated, "'[a] cardinal principle of our system of justice is that not only must there be the reality of a fair trial and impartiality in accordance with due process, but also the appearance of a fair trial and impartiality.'" The very essence of the due process Amendments to the U.S. Constitution is their guaranties of a fair trial and hearing. That has also been a guiding principle of the cases, etc. that have interpreted these Amendments and explored their application under actual circumstances.

Due process not only requires fairness, but also the appearance of fairness. Fairness and the appearance of fairness are sorely lacking here. The denial of *pro hac vice* status for ALBERTINI was initially made by Judge Ibarra, whose ties to ROEHRIG were such that he felt he had to recuse himself, but not until after he had eliminated, based on the most transparently spurious of justifications, the counsel MIYASHIRO believed in and felt had the skills and knowledge to best represent him at trial. Nowhere did Judge Ibarra attempt any analysis of reasons why ALBERTINI should not be allowed to represent MIYASHIRO or the interests of the court dictated ALBERTINI not be allowed to conduct the trial. Judge Masuoka compounds the problem by simply rubber-stamping Judge Ibarra's reasoning, or lack thereof. The Supreme Court of Hawaii seemed unaware that there is a constitutional right at stake, so did not attempt any review of the required

showing for the lower court decisions denying *pro hac vice* status to MIYASHIRO's counsel of choice.

There is neither fairness nor the appearance of fairness in this, quite the opposite. If friends and acquaintances of ROERHIG can eliminate MIYASHIRO's choice of attorney for trial, MIYASHIRO can have little confidence that he will have a full and fair hearing. There is no cogent or logical reason stated for the denial. The denial thus becomes to MIYASHIRO, and to onlookers, likely merely a capricious attempt to impair MIYASHIRO's ability to prove his case and gain redress for the legal malpractice of ROEHRIG. Moreover, the Supreme Court of Hawaii's denial of the Petition for Writ of Mandamus creates a conflict among the courts of the United States, wherein in some places a litigant has constitutional rights to have counsel of choice represent her/him, while in others this right does not exist and a litigant may be deprived of counsel of his choice unfairly and arbitrarily, with the appearance of collusion by friends of a defendant to protect their friend and colleague. Such disparate treatment cannot possibly be consistent with the principles of due process and fair treatment under the law.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to the United States Supreme Court should be granted. Cases sometimes refer to the term "home cooking" when, for whatever reason, a litigant finds himself facing greater odds against winning a lawsuit in a certain locale. Presumably, that is one thing against which the procedural protections of the Fifth, Sixth and Fourteenth

Amendments of the U.S. Constitution are aimed at providing protection. Among the procedural safeguards that have been developed is the right to be represented by the counsel of your choice, in both civil and criminal cases. Granted it is not an absolute or automatic right, but for it to be denied there must be logical and cogent reasons. Here, MIYASHIRO has been deprived of this right without the necessary justification. MIYASHIRO looks to this Court to redress the deprivation of his constitutional right herein by the courts of Hawaii. Hopefully this Court will agree that the treatment of MIYASHIRO by the Supreme Court of Hawaii is unconstitutional and unfair, so cannot be allowed to stand.

January 27, 2007

Respectfully submitted,

GEORGE MIYASHIRO, Petitioner,
in propria persona

APPENDIX A

NO. 28193

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

GEORGE MIYASHIRO, Petitioner,

vs.

THE HONORABLE GEORGE M. MASUOKA, Respondent

ORIGINAL PROCEEDING

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(By: Moon, C.J., Levinson, and Nakayama, JJ., and Intermediate Court of Appeals Judge Nakamura, in place of Duffy, J., recused, and Acoba, J., dissenting)

(Filed Nov. 1, 2006)

Upon consideration of the petition for a writ of mandamus filed by petitioner George Miyashiro and the papers in support, it appears that there is no federal or state constitutional right to *pro hac vice* appearance of counsel before any Hawai'i state court. *See Bank of Hawaii v. Kunimoto,* 91 Hawai'i 372, 388, 984 P.2d 1198, 1214 (1999). Granting Eugene Albertini full *pro hac vice* status in Civil No. 04-1-0211 was within the discretion of the circuit judge, *see* RSCSH 1.9, and the refusal to do so for the reasons for which *pro hac vice,* appearance was initially denied was not a flagrant and manifest abuse of discretion. Thus, petitioner is not entitled to a writ of mandamus. *See Kema v. Gaddis,* 91 Hawai'i 200, 204, 982 P.2d 334, 338 (1999) (A writ of mandamus will not issue unless the petitioner demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested

action. Such a writ is not intended to supersede the legal discretionary authority of the lower court. Where a court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court under circumstances in which it has a legal duty to act.). Therefore,

IT IS HEREBY ORDERED that the petition for a writ of mandamus is denied.

DATED: Honolulu, Hawai'i, November 1, 2006.

David J. Gierlach,
for petitioner

/s/ Honorable C.J. Moon

/s/ Honorable Steven Levinson

/s/ Honorable Paula Nakayama

/s/ Honorable Craig H. Nakamura

I dissent and would grant the petition.

/s/ Honorable J. Acoba

APPENDIX B

S.C. NO. 28193

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEORGE MIYASHIRO, Petitioner, vs. THE HONORABLE GEORGE M. MASUOKA, Respondent.	S.C. NO. 28193 PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM IN SUPPORT OF PETITION

DECLARATION OF EUGENE J. ALBERTINI

DECLARATION OF DAVID J. GIERLACH

EXHIBITS 1 THROUGH 10

CERTIFICATE OF SERVICE

(Filed Oct. 5, 2006)

DAVID J. GIERLAHCH [sic] 5041
500 Ala Moana Boulevard
Suite 330, 5 Waterfront Plaza
Honolulu, Hawaii 96813
Telephone: (808) 523-1332
Fax: (808) 526-2275
Email: gierlach33@aol.com
Attorney for Petitioner

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEORGE MIYASHIRO, Petitioner, vs. THE HONORABLE GEORGE M. MASUOKA, Respondent.	S.C. NO. _____ PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Petitioner respectfully files this Petition for Writ of Mandamus and or Prohibition pursuant to Rule 21(b) of the *Hawaii Rules of Appellate Procedure*. The Petition is supported by a Memorandum in Support of Petition, the Declaration of David J. Gierlach, Exhibits 1 through 10 and any further matters that may be of record in this case.

DATED: Honolulu, Hawaii, October 5, 2006

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Petitioner

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEORGE MIYASHIRO, Petitioner, vs. THE HONORABLE GEORGE M. MASUOKA, Respondent.	S.C. NO. _____ PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM IN SUPPORT OF PETITION

I. STATEMENT OF FACTS

The basis for this Petition for Writ of Mandamus is that the Honorable George M. Masuoka has committed a flagrant and manifest abuse of discretion in refusing to permit full *pro hac vice* status to California attorney Eugene J. Albertini. Filing counsel David J. Gierlach only agreed to enter this case as local counsel with the expectation that Mr. Albertini, an attorney in good standing from California, would be permitted *pro hac vice* status. Mr. Miyashiro interviewed scores of Honolulu, Big Island and other attorneys in an effort to find counsel in the State of Hawaii to prosecute his claims against Defendant Stanley H. Roehrig. Mr. Miyashiro's efforts were unsuccessful. Mr. Albertini is the person with the greatest knowledge of this case, he has been granted limited *pro hac vice* status to conduct all of the discovery, including depositions, but has been barred from participating at the trial of this case. It is that bar that motivates this Petition for Writ of Mandamus.

A. Background

The First Amended Complaint, attached hereto as Exhibit 1, sets forth in detailed fashion the malpractice allegations against Defendant Stanley H. Roehrig. Prior to filing the instant Complaint, Mr. Albertini engaged in substantial investigation including review of over twenty (20) boxes of documents, interviewing witnesses and engaging in other due diligence to determine whether a case in good faith existed. Declaration of Eugene J. Albertini attached.

After the case was filed, each of the Third Circuit Court judges recused themselves from hearing this case. *See* Exhibit 2. The recusals included the Honorable Ronald Ibarra. However, Judge Ibarra did not recuse himself until after he decided to hear and then deny the motion to allow Eugene J. Albertini to appear as counsel *pro hac vice. See* Transcript of Proceedings of October 11, 2004 attached as Exhibit 3. Judge Ibarra cited the following reasons to deny Mr. Albertini *pro hac vice* status:

> He had been an attorney *pro hac vice* four other times in 11 years; he could still be retained as a consultant or paralegal; Gierlach is competent to handle complex trials; and Mr. Miyashiro did not show of the total bar population in the State of Hawaii that he could not obtain another lawyer to assist Gierlach in the handling of the case.

Id. at 39.[1]

[1] The Verified Application of Albertini to appear as counsel *pro hac vice* is attached hereto as Exhibit 4.

In light of Judge Ibarra's comment that Miyashiro had not exhausted his efforts to find local counsel to try the case, Mr. Miyashiro then undertook an exhaustive effort to contact counsel throughout the State of Hawaii seeking representation in this case. He then filed, on November 22, 2004, a second motion to allow Albertini to appear as *pro hac vice*. *See* Exhibit 5 attached hereto. Therein, Mr. Miyashiro delineated his exhaustive efforts to find local counsel to try this case. *Id.* Those efforts were unsuccessful. On December 8, 2004, Judge Ibarra recused himself from this case. Exhibit 6.

On December 14, 2004, this Honorable Court assigned the Honorable George M. Masuoka as the Presiding Judge in this case. *See* Exhibit 7 attached hereto. The motion to permit Albertini to appear *pro hac vice* came on for hearing before Judge Masuoka on April 6, 2005. *See* Exhibit 8.

Because of the importance of Albertini of being able to play a significant role in the trial of this case, Mr. Miyashiro went to the remarkable extent of agreeing with the Defendants to dismiss Co-Defendants Judge Glenn Hara and the Roehrig law firm as Defendants in exchange for Defendants withdrawing their objection to Albertini's *pro hac vice* status. During off the record discussions, Judge Masuoka said he would not agree to allow Albertini full status at that time. The parties and the Judge then agreed that Mr. Albertini would be permitted to participate in all non-court matters and the issue of his participation at the trial was to be reserved for further determination. *Id.* at 3:17-22.

In early May 2006, Plaintiff again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant Mr. Albertini full

status as *pro hac vice.* Judge Masuoka declined. Declaration of David J. Gierlach.

Subsequently, because the United States Supreme Court decided the case of *United States v. Gonzalez,* 126 S.Ct. 2557 (2006), wherein the high court determined, pursuant to the Sixth Amendment, that a criminal defendant had a constitutional right to the counsel of his choice, whether or not that counsel was licensed to practice in a particular state. Based on that and also based on the Fifth and Eleventh Circuits which have held that a Fifth Amendment right exists with respect to counsel of choice for civil cases, Plaintiff renewed his request for admission of Albertini full status *pro hac vice. See* Exhibit 9 attached. That motion came on for hearing on September 19, 2006. *Id.* It was denied by Judge Masuoka. Judge Masuoka gave two reasons for the denial. First, he said he had the discretion to deny it and second, he tended to agree with Judge Ibarra's reasoning in the original denial. *See supra. See* Transcript of Proceedings for September 19, 2006 which shall be filed as an errata upon its receipt.

Of some importance is that for much of 2005 and between February 2006 and early May 2006, discovery was stayed at the insistence of the Defendant. Declaration of David J. Gierlach. Discovery was only permitted to resume in May 2006 and has only actually resumed effective July 2006. In short, approximately four months have been permitted to prepare this case for trial. If Mr. Albertini were permitted to try this case, Plaintiff would be well and competently represented because he is the holder of the necessary information about this case. Depositions are going forward at full bore. Mr. Albertini has attended these depositions, he has taken all of the depositions on behalf of Plaintiff. Albertini is the attorney

that Plaintiff has chosen to represent him in this case. Accordingly, barring him from participating in the trial is highly prejudicial and the reasons given for such a bar have demonstrated a manifest abuse of discretion by the trial court.

II. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

1. Whether the trial court has committed a flagrant and manifest abuse of discretion in refusing to permit California attorney in good standing Eugene J. Albertini to participate in the trial of this matter when Plaintiff has chosen Mr. Albertini as his counsel of choice, Albertini is most knowledgeable about Plaintiff's claims, and Albertini is most prepared to try this case?

2. Whether the trial in this case should be stayed pending a determination by this Court of the pending writ?

Mr. Miyashiro respectfully requests this Court to direct Judge Masuoka to permit Eugene J. Albertini to participate as trial counsel (with Gierlach participating also as local counsel) in the trial of this case. In addition, it is respectfully requested that this Court stay the pending trial until a determination of this matter is made.

IV. [sic] STATEMENT OF REASONS FOR ISSUING THE WRIT

A. A Writ Of Mandamus Is Appropriate Under The Instant Circumstances

A writ of mandamus is extraordinary remedy that will not issue unless the petitioner demonstrates:

> (1) a clear and indisputable right to relief; and (2) a lack of other means adequately to address the alleged wrong or obtain the requested action. *Tanaka v. Nagata*, 76 Hawaii 32, 35, 868 P.2d 450, 453 (1994).
>
> * * *
>
> Where a trial court has discretion to act, mandamus clearly will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before the court under circumstances in which it is subject to a legal duty to act. *State ex. rel. Marsland v. Ames,* 71 Haw. 304, 307, 788 P.2d 1281, 1283 (1990).

Straub Clinic & Hospital v. Kochi, 81 Hawaii 410, 417, 917 P.2d 1284, 1291 (1996).

As set out below, Mr. Miyashiro has a constitutional right, grounded in the Fifth Amendment of the *United States Constitution,* to counsel of his choice in a civil case. The denial of that right is causing immediate, irreparable and unreviewable harm to Mr. Miyashiro. He is denied his counsel of choice in the face of only specious reasoning. The matter is effectively unreviewable on appeal because it is impossible to demonstrate how the outcome would have changed if Albertini participated.

B. Mr. Miyashiro Has A Constitutional Right To Counsel Of His Choice Absent Extraordinary Circumstances

According to *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1262 and n. 24 (5th Cir. 1983), "the right to counsel in criminal cases is expressly guaranteed by the Sixth Amendment; the right to counsel in civil cases is no less fundamental and springs from both statutory authority [*i.e.*, 28 U.S.C. § 1654 n.20] and from the constitutional right to due process of law." "It is true that there is a 'fundamental right to counsel,' in civil cases, that right springs generally from the protections of the due process clause. *See generally, Robinson v. Boeing Co.,* 79 F.3d 1053 (11th Cir. 1996)." *Glover v. Standard Federal Bank,* 2001 U.S. Dist. LEXIS 6658 (March 6, 2001), *rev'd on other grounds, Glover v. Standard Federal Bank,* 283 F.3d 953 (8th Cir. 2002).

The United States Supreme Court, in *United States v. Gonzalez-Lopez,* 126 S.Ct. 2557 (2006), found a constitutional right to counsel of one's choice in criminal cases pursuant to the Sixth Amendment. While counsel for Petitioner recognizes that this is not a criminal case, the policy factors which supported a ringing endorsement of counsel of one's choice in *Gonzalez* apply equally well to the facts of this case.

Here is how the Court reasoned:

> We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminent, unquestionably qualifies as 'structural error.'" [Citation omitted]. Different attorneys will pursue different strategies with

> regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument.
>
> * * *
>
> In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," [citation omitted] – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then quantify the impact of those different choices on the outcome of the proceedings. Many counsel decisions, . . . do not even concern the conduct of trial at all."

Id. at 2564-2565.

Rule 1.9 of the *Rules of the Hawaii Supreme Court* appear to support this broad interpretation of *pro hac vice* status for attorneys in Hawaii. "Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia who is not a resident of Hawaii may be permitted to associate himself or herself with a member or members of the Hawaii bar in the presentation of a specific case at the discretion of the presiding judge or judges." It is axiomatic that a trial court may not arbitrarily deny *pro hac vice* status. *Fuller v. Diesslin,* 868 F.2d 604 (3rd Cir. 1989), *cert. denied,* 110 S.Ct. 203.

In this case, Mr. Miyashiro made great efforts to obtain competent local counsel with the resources and willingness to take on the malpractice case against Mr. Roehrig. He was unable to do so. After Judge Ibarra's ruling regarding Albertini's *pro hac vice* status, Mr. Miyashiro again made

efforts to contact attorneys throughout the State of Hawaii. He again was unable to do so. Neither Judge Ibarra nor Judge Masuoka have given reasonable explanations as to why *pro hac vice* status for trial has been denied.

Accordingly, it is respectfully requested that this Honorable Court grant the Petition for Writ of Mandamus. It is also respectfully requested that this Court enter a stay of the pending trial until this matter is resolved.

DATED: Honolulu, Hawaii, October 5, 2006.

/s/ David J. Gierlach
DAVID J. GIERLACH
Attorney for Petitioner

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEORGE MIYASHIRO, Petitioner, vs. THE HONORABLE GEORGE M. MASUOKA, Respondent.	S.C. NO. _____ DECLARATION OF EUGENE J. ALBERTINI

DECLARATION OF
EUGENE J. ALBERTINI

EUGENE J. ALBERTINI declares as follows:

1. I am an attorney in good standing licensed to practice law before all courts in the State of California and have personal knowledge of the facts set forth herein.

2. The First Amended Complaint sets forth in detailed fashion the malpractice allegations against Defendant Stanley H. Roehrig. Prior to preparing to and filing the instant Complaint, I engaged in substantial investigation including over twenty (20) boxes of documents, interviewing witnesses and other due diligence to determine whether a case in good faith existed.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: La Quinta, California October 2, 2006.

/s/ E.J. Albertini
EUGENE J. ALBERTINI

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEORGE MIYASHIRO, Petitioner, vs. THE HONORABLE GEORGE M. MASUOKA, Respondent.	S.C. NO. _____ DECLARATION OF DAVID J. GIERLACH

DECLARATION OF
DAVID J. GIERLACH

DAVID J. GIERLACH declares as follows:

1. I am an attorney licensed to practice law before all courts in the State of Hawaii and am the attorney of record for Plaintiff herein.

2. In early May 2006, counsel for Plaintiff again raised the issue informally with Judge Masuoka at hearings on motions as to whether he would be inclined to grant Mr. Albertini full status as *pro hac vice.* Judge Masuoka declined.

3. Of some importance is that between February 2006 and early May 2006, discovery in this case was stayed at the insistence of the Defendant.

4. Attached hereto as Exhibit 1 is a true and correct copy of the First Amended Complaint filed in this case on August 4, 2004.

5. Attached hereto as Exhibit 2 are true and correct copies of Certificates of Disqualification from the Circuit Court judges on the island of Hawaii.

6. Attached hereto as Exhibit 3 is a true and correct copy of the Verified Application of Eugene J. Albertini To Appear As Counsel *Pro Hac Vice.*

7. Attached hereto as Exhibit 4 is a true and correct copy of the Transcript of Proceedings before the Honorable Ronald Ibarra, dated October 11, 2004.

8. Attached hereto as Exhibit 5 is a true and correct copy of Plaintiff George Miyashiro's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* with its attachments.

9. Attached hereto as Exhibit 6 is a true and correct copy of the Disqualification Notice filed by Judge Ibarra on December 8, 2004.

10. Attached hereto as Exhibit 7 is a true and correct copy of the Assignment of Circuit Court Judge filed December 14, 2004.

11. Attached hereto as Exhibit 8 is a true and correct copy of a Notice of Hearing Re: Plaintiff George Miyashiro's Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice,* filed November 22, 2005.

12. Attached hereto as Exhibit 9 is a true and correct copy of the Transcript of Proceedings before the Honorable George Masuoka dated April 6, 2005.

13. Attached hereto as Exhibit 10 is a true and correct copy of Plaintiff George Miyashiro's Renewed Motion to Allow Eugene J. Albertini to Appear as Counsel *Pro Hac Vice* With Full Status, filed August 28, 2006.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, October 5, 2006.

/s/ David J. Gierlach
DAVID J. GIERLACH

[Exhibits Omitted In Printing]